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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 1972 of 1996.

APPELLANT Jailal and another

Vs.

RESPONDENT The State of Chhattisgarh

Judgment post for 30-7-2007

Sd/-
DHIRENDRA MISHRA
Judge

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 1972 of 1996.

APPELLANT

1. Jailal, son of Rajbhan, Harijan, aged about 18 years
2. Ram Prasad, son of Deosai, aged about 19 years

Both are residents of village Gadbadi, Baikunthpur, Distt. Surguja (C.G.)

Vs.

RESPONDENT The State of Chhattisgarh, through District Magistrate, Surguja, C/o. Police Station Baikunthpur, Distt. Surguja (C.G.)

Shri Chandresh Shrivastava, Advocate for the appellants.

Shri Pradeep Singh, Panel Lawyer, for the State.

J U D G M E N T

Dhirendra Mishra, J.

The appellants have preferred this appeal against the judgment dated 31st October, 1996 passed in S.T. No. 239/1995 whereby learned Additional Sessions Judge, Baikunthpur District Sarguja has convicted the appellants under Section 363, 366 and Section 376(2)(g) of I.P.C. and sentenced each of them to undergo three years R.I., to pay a fine of Rs. 500/-, in default of payment of fine to further undergo R.I. for three months, to undergo R.I. for 5 years, to pay a fine of Rs. 500/-, in default of payment of fine to further undergo R.I. for 3 months, and to undergo R.I. for 10 years, to pay a fine of Rs. 1000/- and in default of payment of fine to further undergo R.I. for 5 months respectively. All the substantive sentences are to run concurrently.

2. Case of the prosecution, in brief, is that on 13-2-1995, the prosecutrix along with her friend Ku. Anjana Sahu was returning from her school to her home, at that time accused Jailal stopped her on way, co-accused Ram Prasad took out vermillion from his pocket and gave it to Jailal who put it in the

hair parting of the prosecutrix which was objected to by the prosecutrix who tried to run away, however, the accused Jailal caught her braid. Vijay, Kamleshwar, Nareshwar etc. tried to intervene and Kamleshwar proceeded in that direction, appellant Ram Prasad took out a knife from his pocket and threatened and also slapped 3-4 time to Kamleshwar, thereafter Jailal took the prosecutrix on his shoulder and ultimately he took her on his bicycle and proceeded towards spring situated in hillock in Golhapani road. The prosecutrix was weeping all through and was requesting to free her, however, the accused Jailal committed rape and accused Ram Prasad stood guard. After committing the offence, he took her to a temple and obtained vow and left her. The prosecutrix returned to her home and narrated the incident to her brother Rajendra who communicated the same to his father, thereafter report was lodged in the Police Station, Baikunthpur vide Ex. P-6. The prosecutrix was sent for medical examination to Community Health Centre, Baikunthpur where Dr. Rajni Sharma (P.W. 11) examined her and gave report of Ex. P-10.

3. The appellants were charged by learned trial Court for offence under Sections 363, 366 and 376(2)(g) of I.P.C., who abjured their guilt. The prosecution in order to establish the charges against the appellants examined 14 witnesses. The appellants in their statements under Section 313 of Cr.P.C. denied the circumstances appearing against them in prosecution evidence and pleaded innocence and false implication. However, learned trial Court convicted and sentenced the appellants as mentioned above.

4. Learned counsel for the appellants submitted that the prosecution has failed to prove that the prosecutrix was less than 18 years old at the time of incident. No admissible documentary or medical evidence was adduced in this regard and the finding of the trial Court which is based on oral

testimony of the prosecutrix herself and her parents and also based on photo copies of the mark sheets of the prosecutrix, is not in accordance with law. Reliance is placed upon the judgments in the matter of **Ravinder Singh Gorkhi –v- State of U.P.** (AIR 2006 SC 2157) and **Ram Murti –v- State of Haryana** (AIR 1970 SC 1020). It is further argued that the prosecutrix was a consenting party as is evident from her own testimony and the statement of other witnesses. She accompanied the accused of her own freewill on the carrier of his bicycle and did not make any attempt to flee from his clutches, though she had an opportunity to do so, and it is indicative of the fact that she was a consenting party. Reliance is placed upon the judgment in the matter of **Shyam and another –v- State of Maharashtra** (AIR 1995 SC 2169). It is further contended that the appellant Ram Prasad has not participated in the offence of rape. There is no evidence available on record that he had common intention along with accused Jailal right from inception to commit rape. On the contrary, there is categorical evidence that he was only present there and stood guard while allegation of rape is against the accused Jailal. Placing reliance upon the judgment in the matter of **Pradeep Kumar –v- Union Administration** (AIR 2006 SC 2992), it is argued that mere presence of the accused appellant in spot is insufficient to show that there was a prior concert or meeting of mind or plan formed at time of commission of offence by him with other accused person for commission of rape on prosecutrix. Placing reliance upon the judgment in the matter of **Priya Patel –v- State of M.P. and another** (2006 AIR SCW 3539), it is argued that a person may be convicted under Section 376(2)(g) for the offence of gang rape only when the prosecution has been able to establish that the offence was committed in furtherance of common intention of committing rape by all. However, in the instant case, there is no evidence that the appellant No. 2 Ram Prasad had at any point

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of time a common intention with co-accused Jailal to commit rape with the prosecution. prosecutrix 14/08/07

5. On the other hand, learned counsel for the State supports the judgment of the trial Court.

6. Learned trial Court while dealing with the question whether the prosecutrix was less than 18 years of age at the time of incident has recorded a finding against the appellants on the basis of photo copy of the mark sheets which has been adduced in the evidence as Ex. P-3, P-4 and P-5 in which the date of birth of the prosecutrix is mentioned as 6-6-1979 and further on the basis of the statement of Dr. Rajni Sharma who after medical examination of the prosecutrix has assessed her age as 16 years and also on the basis of the statement of the prosecutrix herself who has stated that her age is less than 16 years, that the prosecutrix was less than 16 years old at the time of incident. The documents of Ex. P-3, P-4 and P-5 being mark sheets have been proved by herself who has stated that she has given her date of birth on the basis of mark sheets and that the date of birth was given by her father in the school. She has denied that her age is 18 to 19 years. Babulal father of the prosecutrix has been examined as P.W. 8. He has stated that he does not remember the date of birth of his daughter. He is not in a position to say whether his daughter was 17 - 18 year old at the time of incident. In the matter of **Ram Murti** (supra), it has been held that only on the basis of unproved and un-exhibited school certificate, the age of the prosecutrix cannot be ascertained. In the matter of **Ravinder Singh** (supra), considering that the register maintained by the school was not produced and only second copy of School Leaving Certificate was produced and not its original copy, the claim that he was 16 years of age at the time of commission of offence was not accepted. Thus from the evidence available on record, the finding of the trial Court that the prosecutrix was less than 16

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years of age at the time of commission of offence does not appear to be in accordance with law and it is held that the prosecution has not been able to establish that the prosecutrix was less than 16 years of age or less than 18 years of age at the time of incident.

7. Now coming to the second argument advanced by the counsel that the prosecutrix was a consenting party. P.W. 1 the prosecutrix who has not been administered oath because she was considered minor, has stated that she was returning from her school along with friend Ku. Anjana Sahu, when both the accused persons stopped her, applied vermillion on her hair parting and appellant No. 1 forcibly took her on his bicycle towards spring and ignored her repeated prayer to free her. When Kamleshwar and other students tried to intervene, they were threatened with knife point and one of them Kamleshwar was even slapped. Co-accused Ram Prasad also accompanied them to a certain distance and Jailal took her into forest and torn her cloth, took out her Salwar and raped her, thereafter asked her not to disclose this fact to any one and both the accused persons took her to Hamuman temple, Jaliadand and obtained vow in the temple that she will not disclose the incident to any one. However, she narrated the incident to her brother who narrated the same to the parents and, thereafter report was lodged. She has admitted that two months prior to the incident also, the accused had eve teased her. She has further stated that she was examined by the doctor and she had sustained injuries on her private part. In para 12 of her statement, she has stated that Jailal had taken her on the carrier of his bicycle. Since Ram Prasad was holding knife, she did not jump from the bicycle. She has denied the suggestion that she accompanied the accused by her own freewill. Learned counsel for the appellant had pointed out para 21 of statement of this witness wherein she has stated that it is correct to say

that Ram Prasad was asking Jailal as to where he was taking her. However she has admitted that Ram Prasad had done nothing with her nor he told anything to her. P.W. 2 Rajendra Prasad has also stated that Anjana is her younger sister and she informed him after returning from the school that the appellants have taken the prosecutrix forcibly towards village Dohda. P.W. 4 Anjna Kumari has also stated that the accused persons met them on the way when they were returning from the school and Jailal caught the prosecutrix whereupon the prosecutrix started weeping and Jailal asked her to go to her home or he will beat. Similar is the statement of Vijay Singh (P.W. 5) who has also corroborated the statement of the prosecutrix. This witness has also stated that the prosecutrix was weeping and trying to free herself and Ram Prasad was sitting in the bicycle with knife. P.W. 12 Kamleshwar has stated that he along with other students including the prosecutrix and Anjana were returning from school, on way, they found Jailal and Ram Prasad. Jailal caught hold of the hand of the prosecutrix. The prosecutrix tried to free herself but Jailal did not allow her. Ram Prasad gave vermillion to Jailal who applied the same on the hair parting of the prosecutrix. When he tried to free the prosecutrix, Ram Prasad caught him and Jailal slapped him 3-4 times and Ram Prasad threatened him with knife. Jailal took the prosecutrix on his shoulder towards Dohda. Ram Prasad followed them and all the three went in the bicycle. Statements of these witnesses are further corroborated by the statement of the Dr. Rajni Sharma (P.W. 11) who has examined the prosecutrix and has found numerous abrasions on the back of the prosecutrix. She has further stated that hymen of the prosecutrix was absent, however her vagina did not admit two fingers easily and it was entering with difficulty and there was swelling in the vagina and she was complaining pain. She has further observed that white liquid was present

inside the vagina and she was complaining pain. On the basis of injuries present on back portion and pain in the vagina, she has opined that the prosecutrix was forcibly raped.

8. In the matter of **Shyam and another** (supra), the Hon'ble Supreme Court on the evidence that two accused persons came on their respective bicycles, took the prosecutrix on carrier of the bicycle to house of someone and she was made to perform a ritual signifying marriage between her and Shyam, considering that the girl did not jump from the carrier of the bicycle or put up a struggle or raised an alarm to protect herself, has held the prosecutrix of that case a willing party. However in the instant case, apart from the statement of the prosecutrix, her statement is duly corroborated by the witnesses who are students studying in the same school whose presence is absolutely natural and who have categorically stated that the prosecutrix was forcibly taken by the accused on the knife point. Therefore, the submission of the counsel that the prosecutrix was consenting party is ruled out and the same cannot be accepted.

9. Now coming to the third argument advanced by the counsel regarding Ram Prasad that he could not have been convicted under Section 376(2)(g) of I.P.C. as there is no evidence available on record to show that accused Ram Prasad had at any point of time a common intention with the accused Jailal to commit rape. From the perusal of the statement of P.W.1 the prosecutrix and other witnesses, the case of the prosecution, it appears, is that the accused Jailal wanted to marry the prosecutrix and, therefore, he applied vermillion on her hair parting and thereafter forcibly took the prosecutrix and committed rape in the forest and allegation against the accused Ram Prasad is that he helped Jailal in abducting the prosecutrix and remained at a distance when the appellant committed rape upon the prosecutrix. In the matter of **Priya Patel** (supra), while dealing with explanation (1) of Section

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376(2)(g) gang rape, Hon'ble Supreme Court has held that according to explanation (1) where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each such person shall be deemed to have committed gang rape within sub – section 2 of Section 376. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. Common intention is dealt with under Section 34 of the I.P.C. It provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. Common intention denotes action in concert in commission of crime of rape with pre-arranged plan, prior meeting of mind and with element of participation in action. The acts may be different and vary in character but must be actuated by the same common intention which is different from same intention or similar intention. Sine quo non for bringing an application under Section 34 of I.P.C., that the act must be done in furtherance of the common intention to do a criminal act. The expression 'in furtherance of their common intention' as appearing in the explanation to Section 376(2) relates to intention to commit rape.

10. In the matter of **Pradeep**(supra) the Hon'ble Supreme Court has further held that to bring home the offence within the purview of Section 376(2)(g) of I.P.C. read with explanation 1 to this Section, it is necessary for the prosecution to prove:-

(i) that more than one person had acted in concert with the common intention to commit rape on the victim;

(ii) that more than one accused had acted in concert in commission of crime of rape with pre-arranged plan, prior meeting of mind and with element of participation in action. Common intention would be

action in consort in pre-arranged plan or a plan formed suddenly at the time of commission of offence which is reflected by element of participation in action or by the proof of the fact of inaction when the action would be necessary. The prosecution would be required to prove pre-meeting of mind of accused persons prior to commission of offence of rape by substantial evidence or by circumstantial evidence; and

(iii) that in furtherance of such common intention one or more persons of the group actually committed offence of rape on victim or victims. Prosecution is not required to prove actual commission of rape by each and every accused forming group.

11. If the above principles of law laid down by the Apex Court is applied in the facts of the present case then from the evidence available on record, it is evident that there is no evidence that Ram Prasad shared the common intention to commit rape with appellant Jailal as there is no evidence against this appellant that before the incident of abduction, during abduction or thereafter subsequent thereto, at any point of time, he had common intention to commit rape with the prosecutrix. In these circumstances, the submission of the learned counsel for the appellants that appellant No. 2 cannot be convicted for commission of offence punishable under Section 376(2)(g) of I.P.C. has to be accepted.

12. In the result, the appeal preferred by the appellants is partly allowed. Conviction and sentence of appellant Jailal under Section 363 of I.P.C. are set aside, however his conviction under Section 366 of I.P.C. is maintained and he is sentenced to undergo R.I. for two years, to pay a fine of Rs. 500/-, in default of payment of fine, to further undergo additional R.I. for three months. His conviction under section 376(2)(g) I.P.C. is altered

to Section 376 of I.P.C. and he is sentenced to undergo R.I. for 10 years, to pay a fine of Rs. 1000/-, in default of payment of fine, to further undergo additional R.I. for 6 months. Similarly, conviction and sentence of appellant Ram Prasad under Sections 363 and 376(2)(g) I.P.C. are set aside and he is acquitted of the above charges. However, his conviction under Section 366 I.P.C. is maintained and he is sentenced to undergo R.I. for two years, to pay a fine of Rs. 500/-, in default of payment of fine, to further undergo additional R.I. for three months. It is stated that he is on bail. His bail bond is cancelled. He shall surrender forthwith to undergo the remaining jail sentence.

Sd/-
DHIRENDRA MISHRA
Judge
30-7-2007